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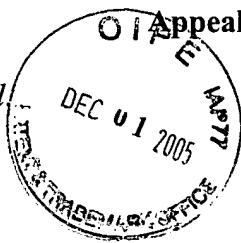
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Appeal Brief Transmittal

In re application of: Bartley, et al.

Serial No.: 09/892,424

Filed on: 06/27/01



For: **APPARATUS, METHOD, AND BUSINESS METHOD FOR ENABLING CUSTOMER ACCESS
TO COMPUTER SYSTEM PERFORMANCE DATA IN EXCHANGE FOR SHARING THE
PERFORMANCE DATA**

Mail Stop APPEAL BRIEF - PATENT

Commissioner for Patents

P.O. Box 1450

Alexandria, VA 22313-1450

Sir:

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Respectfully submitted,

By



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Date: November 28, 2005

By:





IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of: Bartley, et al. Docket No.: ROC920000298US1

Serial No.: 09/892,424 Group Art Unit: 2141

Filed: 06/27/01 Examiner: Luu, Le Hien

For: APPARATUS, METHOD, AND BUSINESS METHOD FOR ENABLING
CUSTOMER ACCESS TO COMPUTER SYSTEM PERFORMANCE DATA IN
EXCHANGE FOR SHARING THE PERFORMANCE DATA

APPEAL BRIEF

Mail Stop APPEAL BRIEF - PATENTS
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir/Madam:

This appeal is taken from the Examiner's final rejection, set forth in the Office Action dated 05/27/05, and affirmed in the Advisory Action dated 8/31/2005, of applicants' claims 1-22. Applicants' Notice of Appeal under 37 C.F.R. § 1.191 was mailed on 9/26/2005.

REAL PARTY IN INTEREST

International Business Machines Corporation is the Real Party in Interest.

RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences for this patent application.

STATUS OF CLAIMS

As filed, this case included claims 1-22. No claims were added, canceled or amended. The claims remaining in the case are claims 1-22 as originally filed, all of which stand finally rejected. No claim has been allowed.

STATUS OF AMENDMENTS

After the first office action, an amendment was filed to amend the specification and request reconsideration for the rejection of the claims. After the final rejection dated 05/27/2005, a request for reconsideration was filed on 07/29/2005. The Examiner informed applicants by way of an Advisory Action dated 08/31/2005 that the request for reconsideration did not place the application in condition for allowance. A Notice of Appeal was timely filed, and this Appeal Brief is also being timely filed. Therefore, the claims at issue in this appeal are the claims as originally filed.

SUMMARY OF CLAIMED SUBJECT MATTER

Claim 1 recites a computer system with a performance data collection mechanism (Figure 1, 150; page 6, line 7) that collects performance data, a performance data transmission mechanism (Figures 1 and 2, 170; page 6, line 20) that when enabled transmits performance data to another computer system; and a performance data access mechanism (Figures 1 and 2, 160; page 6, line 29) that allows access to the performance data by a user of the computer system only if the performance data transmission mechanism is enabled (Figure 3, 330 and 340; page 11, lines 17-20).

Claim 5 recites a networked computer system comprising a first computer system (Figure 1, 110; page 5, line 20) coupled via a network to a second computer system (Figure 1, 120; page 6, line 5) where the second computer system has a performance data

collection mechanism (Figure 1, 150; page 6, line 7); a performance data transmission mechanism (Figures 1 and 2, 170; page 6, line 20) that when enabled transmits performance data to another computer system; and a performance data access mechanism (Figures 1 and 2, 160; page 6, line 29) that allows access to the performance data by a user of the computer system only if the performance data transmission mechanism is enabled (Figure 3, 330 and 340; page 6, lines 17-20).

Claim 8 recites a method that focuses on the access to performance data by the user of the collecting computer. If transmission of the performance data from the second computer system to the first computer system is enabled, allowing the user to access the performance data; and if transmission of the performance data is not enabled, not allowing the user to access the performance data (Figure 3, steps 310-350; page 11, lines 13-22).

Claim 9 recites a method that focuses on access to performance data by a first computer (vendor) to data collected on a second computer (customer). If transmission is enabled, allowing access to the performance data by a user of the second computer system; if transmission is not enabled, not allowing access to the performance data by a user of the second computer system; and second computer system transmitting performance data to the first computer system (Figure 3, steps 310-350; page 11, lines 13-22).

Claim 10 is similar to claim 8 but adds detail on access to the data by the second (user's) computer to a limited portion of performance data, or more than limited portion of performance data depending on whether transmission of the performance data to the first computer (vendor's) is enabled (Figure 4, steps 410-450; page 11, line 23 - page 12, line 11).

Claim 11 is similar to claim 10 but adds detail on transmitting performance data to the first (vendor's) computer (Figure 4, steps 410-450; page 11, line 23 - page 12, line 11).

Claim 12 is a method for doing business that offers to a customer the ability to access performance data gathered by a customer computer system in exchange for the customer's sharing of the performance data. If the customer does not accept the offer then the customer access to the performance data on the customer computer system is disabled, and if the customer accepts the offer then the customer access to the performance data on the customer computer system is enabled (Figure 5, steps 510-560; page 12, lines 13-25).

Claim 15 is a program product similar in scope to claim 1 (Figure 2, 150, 160, 170; page 6, line 7 to page 7, line 4), (Figure 3, 330 and 340; page 11, lines 17-20).

Claim 15 also recites computer readable signal bearing media (Figure 2, 295; page 11, lines 10-12).

Claim 19 is a program product that includes an operating system with the features similar to those recited in claim 15 (Figure 2, 150, 160, 170; page 6, line 7 to page 7, line 4), (Figure 3, 330 and 340; page 11, lines 17-20), (Figure 2, 295; page 11, lines 10-12).

GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

The following single ground of rejection is presented for review on this Appeal:

1. **Whether claims 1-22 are unpatentable as being anticipated under 35 U.S.C. §102(e) by United States Patent Application Pub. No. 2002/0052947. “Method And System For Managing Performance Data Transfers For A Data Access Mechanism” to Duimovich *et al.* (hereinafter Duimovich).**

ARGUMENT

Issue 1: Whether claims 1-22 are unpatentable as being anticipated under 35 U.S.C. §102(e) by United States Patent Pub. No. 2002/0052947. “Method And System For Managing Performance Data Transfers For A Data Access Mechanism” to Duimovich.

Claims 1 and 5

In the Office Action dated May 27, 2005 the Examiner rejected claims 1-22 under 35 U.S.C. §102(e) as being anticipated by Duimovich. Applicants respectfully assert that the cited art does not anticipate applicants' invention as claimed. To understand the reasons for this assertion, Duimovich is discussed in detail below, along with a comparison with the claims.

Claim 1 includes the following limitation (and claim 5 has a similar limitation):

“. . . a performance data access mechanism . . . allowing access to the performance data by a user the computer system only if the performance data transmission mechanism is enabled.”

In the rejection, the Examiner states that Duimovich teaches the performance data access mechanism recited in claim 1, citing page 3, paragraphs 0039-0041 of Duimovich. Applicant respectfully asserts that Duimovich does not teach or suggest the performance data access mechanism specified in claim 1.

The cited portion of Duimovich describes a client application that collects web browser-based performance data. The performance data is shared in the form of a page summary by placing it in a shared memory segment. The performance data is not

transmitted, but is placed in shared memory where it is may be read, and thus shared. There is no discussion in the cited text concerning the data access mechanism allowing access to performance data by a user of the computer system only if the performance data transmission mechanism is enabled. This claimed feature allows the supplier of software or hardware to control the access to performance data by a user only if the user is willing to share the performance data. The art cited by the Examiner does not teach or suggest this interaction of the performance data access mechanism and the performance data transmission mechanism.

A telephone interview and e-mails to the Examiner resulted in the Examiner revealing the mapping of claim elements to the cited art. It was then first discovered by the Applicant that the Examiner maps the claim element “allows access to the performance data by a user of the second computer system only if the performance data transmission mechanism is enabled” to the communication between the agent and server that permits configuration of agent's configuration information. This most important part of the Examiner's rejection is not at all evident from the first office action and was not clearly stated in the second office action. The failure to indicate the basis for rejection has unfairly prejudiced the Applicant's ability to respond to the rejection. Applicant's request for a non-final office action was ignored, but the Examiner's non-response has been assumed to confirm this mapping of the claim elements to support the Examiner's rejection. Because the Examiner did not clearly articulate in the final Office Action or in the Advisory Action a detailed mapping of Duimovich on the recited claim limitations, the Examiner has failed to establish a *prima facie* case of anticipation for claims 1 and 5 under 35 U.S.C. §102(e).

The phone and e-mail discussions with the Examiner established the following associations between the claim elements and the cited art. The user site 50 of Duimovich is mapped to the claim limitation of “user.” The client application 70 is mapped to the data collection mechanism in the claims. The communication between the agent and

server that permits configuration of agent's configuration information (Page 6, para. 66) of Duimovich maps to the performance data access mechanism in the claims. The communication network of Duimovich maps to the performance data transmission mechanism in the claims.

The Examiner's interpretation of the claims and mapping of the cited art to the claim limitations lacks a teaching or suggestion for the claim element of allowing "access to the performance data by a user of the second computer system only if the performance data transmission mechanism is enabled." To properly reject the claims under 35 U.S.C. §102(e), Duimovich would have to teach access to the performance data by a user site only if the client application is properly configured to transmit performance data. There is no such teaching.

In fact the Examiner's interpretation and reading of the cited art on the claims does not make sense with respect to the teaching of Duimovich. The client application 70 of Duimovich collects the performance data. The client application is part of the user site that the Examiner has mapped to the user in the claims. There is no teaching in the cited art of any way to prevent the user site from having access to the performance data. In fact, it is the user site, through the client application, that is obtaining and using the performance data. The user site is never blocked from accessing the performance data that it collects. In contrast, in the claims, the user of the computer collecting the data has conditional access to the data depending on whether the performance data transmission mechanism is enabled.

The Examiner's interpretation of the cited art limits access to performance data in the opposite direction compared to the direction of limited access described in the claims. Under the Examiner's reading of the prior art, the client application is configured to not obtain the performance data. In such a scenario, there would be no performance data stored in the shared memory. The server then would not have access to the performance

data since it was not stored in the shared memory. The user site that is collecting the performance data may or may not have access to the performance data under this interpretation. However, the claims require the conditional access to the performance data by the user (user site). Even applying the Examiner's reading of Duimovich on the claims, Duimovich does not teach or suggest that the user site is blocked from the performance data that it collects while the performance data is transmitted to another computer system. In Duimovich, any collected performance data by the user's computer system is *always* available to the user. Duimovich does not teach or suggest that the user site has conditional access to performance data that it collects depending on whether the performance data is transmitted. Therefore the cited art does not teach or suggest claims 1 and 5, and applicants respectfully request that the Examiner's final rejection of claims 1 and 5 under 35 U.S.C. §102(e) be reversed.

Claims 2 and 6

Claims 2 and 6 depend on claims 1 and 5, respectively. The arguments above with respect to claims 1 and 5 apply equally to claims 2 and 6, and are incorporated in this section by reference. Further, with regards to claims 2 and 6, the Examiner has not shown in the prior art where the relationships of the vendor and customer are related to the first and second computer systems recited in claims 2 and 6. The cited section of Duimovich (page 3, para. 36) discusses data stored in the warehouses 140 may be reviewed by subscribers to the performance management service. This cite does not clearly reveal the Examiner's mapping of the claim elements of vendor and customer as it relates to the first and second computer systems. The cited art deals with service providers that can subscribe to the performance management service. It appears from this section that it is the service provider that is sharing performance data with the subscribers. The performance data in the data warehouse 140 is shared with the user site 50 over the internet 40 via the reporting server 150. This reading of Duimovich does not have the claimed direction of performance data sharing, i.e. the "customer computer

sharing the performance data.” Therefore, claims 2 and 6 are independently patentable over the cited art, notwithstanding the patentability *vel non* of other claims herein. In addition, claims 2 and 6 depend on claims 1 and 5, respectively, which are allowable for the reasons given above. As a result, claims 2 and 6 are also allowable as depending on allowable independent claims. Applicants respectfully request that the Examiner’s final rejection of claims 2 and 6 under 35 U.S.C. §102(e) be reversed.

Claims 3-4 and 7

Claims 3- 4 and 7 depend on claims 1 and 5, respectively. The arguments above with respect to claims 1 and 5 apply equally to claims 3-4 and 7, and are incorporated in this section by reference. Further, with regards to claims 3-4 and 7, the Examiner has not shown any teaching in Duimovich that shows the performance data collected by the operating system. The cited section of Duimovich (page 3, para. 37) merely states that the typical user site includes a CPU with an operating system. There is no teaching that the performance data is being collected by the operating system. In fact Duimovich teaches away from the operating system collecting the performance data because it is the client “installed” on the user site that is collecting the performance data (page 2, para. 23). Because Duimovich does not teach an operating system that is collecting the performance data, claims 3-4 and 7 are allowable over Duimovich. In addition, claims 3- 4 depend on claim 1, and claim 7 depends on claim 5, which are allowable for the reasons given above. As a result, claims 3-4 and 7 are also allowable as depending on allowable independent claims. Applicants respectfully request that the Examiner’s final rejection of claims 3-4 and 7 under 35 U.S.C. §102(e) be reversed.

Claims 8 and 9

Independent claims 8 and 9 were rejected by the Examiner on the same rationale as claims 5-7 without further arguments. The arguments above with respect to claims 1

and 5 apply equally to claims 8 and 9, and are incorporated in this section by reference. In addition, in claims 8 and 9 the enabling of the performance access mechanism is in the form of steps that are performed in a specific sequence. Applicants respectfully assert that Duimovich does not teach or suggest these steps as claimed. Further, the Examiner has not shown where Duimovich teaches to perform these steps as claimed. As a result, the Examiner has failed to establish a *prima facie* case of anticipation for these claims under 35 U.S.C. §102(e). Applicant respectfully requests that the Examiner's final rejection of claims 8 and 9 under 35 U.S.C. §102(e) be reversed.

|
Claims 10 and 11

Independent claims 10 and 11 were rejected by the Examiner on the same rationale as claims 5-7 without further arguments. The arguments above with respect to claim 8 apply equally to claims 10 and 11, and are incorporated in this section by reference. Further, claims 10 and 11 include a limitation not found in claims 5-7 that were argued by the Examiner. Claims 10 and 11 include the limitation where the user requests more than a limited portion of the performance data before checking if the transmission of the performance data is enabled or not. The Examiner has not shown this feature in Duimovich. As a result, the Examiner has not established a *prima facie* case of anticipation for this claim under 35 U.S.C. §102(e). Duimovich as interpreted by the examiner is all or nothing - either the server can access all the performance data at the user site, or it can access none of the performance data at the user site. Nowhere does Duimovich teach or suggest allowing unconditional access to a portion of the performance data and conditional access to a different portion of the performance data as recited in claims 10 and 11. Applicant respectfully requests that the Examiner's final rejection of claims 10 and 11 under 35 U.S.C. §102(e) be reversed.

Claims 12 -22

Claims 12-22 were rejected by the Examiner in the rejection heading, but no reasons were given for rejecting claims 12-22 under §102(e). As a result, the examiner failed to establish a *prima facie* case of anticipation for these claims under 35 U.S.C. §102(e). Because the Examiner provided no rationale for rejecting claims 12-22, and did not apply any prior art to these claims, applicants request that the Examiner's final rejection of claims 12-22 under 35 U.S.C. §102(e) be reversed.

CONCLUSION

Claims 1-22 are addressed in this Appeal. For the numerous reasons articulated above, applicants maintain that the rejection of claims 1-22 under 35 U.S.C. § 102(3) is erroneous.

Applicants respectfully submit that this Appeal Brief fully responds to, and successfully contravenes, every ground of rejection and respectfully requests that the final rejection be reversed and that all claims in the subject patent application be found allowable.

Respectfully submitted,



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CLAIMS APPENDIX

- 1 1. A computer system comprising:
 - 2 at least one processor;
 - 3 a memory coupled to the at least one processor;
 - 4 a performance data collection mechanism residing in the memory and executed by
 - 5 the at least one processor, the performance data collection mechanism collecting
 - 6 performance data for the computer system;
 - 7 a performance data transmission mechanism residing in the memory and executed
 - 8 by the at least one processor, the performance data transmission mechanism, when
 - 9 enabled, transmitting at least a portion of the performance data to another computer
 - 10 system coupled to the computer system via a network; and
 - 11 a performance data access mechanism residing in the memory and executed by the
 - 12 at least one processor, the performance data access mechanism allowing access to the
 - 13 performance data by a user of the computer system only if the performance data
 - 14 transmission mechanism is enabled.
- 1 2. The computer system of claim 1 wherein the computer system comprises a customer
- 2 computer system and the another computer system comprises a vendor computer system.
- 1 3. The computer system of claim 1 wherein the performance data comprises data
- 2 collected by an operating system residing in the memory and executed by the at least one
- 3 processor.
- 1 4. The computer system of claim 1 wherein the performance data collection mechanism,
- 2 the performance data transmission mechanism, and the performance data access
- 3 mechanism are all controlled by an operating system residing in the memory and executed
- 4 by the at least one processor.

- 1 5. A networked computer system comprising:
 - 2 (A) a first computer system;
 - 3 (B) a second computer system coupled to the first computer system via a network,
 - 4 the second computer system comprising:
 - 5 (B1) a performance data collection mechanism that collects performance
 - 6 data for the second computer system;
 - 7 (B2) a performance data transmission mechanism that, when enabled,
 - 8 transmits at least a portion of the performance data to the first computer system;
 - 9 and
 - 10 (B3) a performance data access mechanism that allows access to the
 - 11 performance data by a user of the second computer system only if the performance
 - 12 data transmission mechanism is enabled.
- 1 6. The networked computer system of claim 5 wherein the first computer system
2 comprises a vendor computer system and the second computer system comprises a
3 customer computer system.
- 1 7. The networked computer system of claim 5 wherein the performance data comprises
2 data collected by an operating system.

- 1 8. A method for a user of a second computer system coupled via a network to a first
- 2 computer system to access performance data collected by the second computer system,
- 3 the method comprising the steps of:
 - 4 (A) the second computer system collecting the performance data;
 - 5 (B) the second computer system determining whether transmission of the
 - 6 performance data from the second computer system to the first computer system is
 - 7 enabled;
 - 8 (C) if transmission of the performance data from the second computer system to
 - 9 the first computer system is enabled, allowing the user to access the performance data;
 - 10 and
 - 11 (D) if transmission of the performance data from the second computer system to
 - 12 the first computer system is not enabled, not allowing the user to access the performance
 - 13 data.

1 9. A method for a first computer system to collect performance data from a second
2 computer system coupled via a network to the first computer system, the method
3 comprising the steps of:
4 (A) the second computer system collecting the performance data;
5 (B) the second computer system determining whether transmission of the
6 performance data from the second computer system to the first computer system is
7 enabled;
8 (C) if transmission of the performance data from the second computer system to
9 the first computer system is enabled, allowing access to the performance data by a user of
10 the second computer system;
11 (D) if transmission of the performance data from the second computer system to
12 the first computer system is not enabled, not allowing access to the performance data by a
13 user of the second computer system; and
14 (E) the second computer system transmitting at least a portion of the performance
15 data to the first computer system.

1 10. A method for a user of a second computer system coupled via a network to a first
2 computer system to access performance data collected by the second computer system,
3 the method comprising the steps of:
4 (A) the second computer system collecting the performance data;
5 (B) the second computer system allowing the user to access a limited portion of
6 the performance data;
7 (C) if the user requests to access more than the limited portion of the performance
8 data:
9 (C1) the second computer system determining whether transmission of the
10 performance data from the second computer system to the first computer system is
11 enabled;
12 (C2) if transmission of the performance data from the second computer
13 system to the first computer system is enabled, allowing the user to access the
14 requested performance data; and
15 (C3) if transmission of the performance data from the second computer
16 system to the first computer system is not enabled, not allowing the user to access
17 the requested performance data.

1 11. A method for a first computer system to collect performance data from a second
2 computer system coupled via a network to the first computer system, the method
3 comprising the steps of:
4 (A) the second computer system collecting the performance data;
5 (B) the second computer system allowing the user to access a limited portion of
6 the performance data;
7 (C) if the user requests to access more than the limited portion of the performance
8 data:
9 (C1) the second computer system determining whether transmission of the
10 performance data from the second computer system to the first computer system is
11 enabled;
12 (C2) if transmission of the performance data from the second computer
13 system to the first computer system is enabled, allowing access to the requested
14 performance data by a user of the second computer system;
15 (C3) if transmission of the performance data from the second computer
16 system to the first computer system is not enabled, not allowing access to the
17 requested performance data by a user of the second computer system; and
18 (C4) the second computer system transmitting at least a portion of the
19 performance data to the first computer system.

- 1 12. A method for doing business comprising the steps of:
 - 2 (A) offering to a customer the ability to access performance data gathered by a
 - 3 customer computer system in exchange for the customer's sharing of the performance
 - 4 data;
 - 5 (B) if the customer does not accept the offer in (A), disabling customer access to
 - 6 the performance data on the customer computer system;
 - 7 (C) if the customer accepts the offer in (A), enabling customer access to the
 - 8 performance data on the customer computer system.

- 1 13. The method of claim 12 further comprising the step of:
 - 2 (D) the customer computer system sharing the performance data.

- 1 14. The method of claim 12 further comprising the step of:
 - 2 selling the customer computer system to the customer.

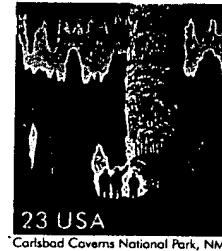
- 1 15. A program product comprising:
 - 2 (A) a performance data collection mechanism that collects performance data for a
 - 3 first computer system;
 - 4 (B) a performance data transmission mechanism that, when enabled, transmits at
 - 5 least a portion of the performance data to a second computer system;
 - 6 (C) a performance data access mechanism that allows access to the performance
 - 7 data only if the performance data transmission mechanism is enabled; and
 - 8 (D) computer-readable signal bearing media bearing (A), (B) and (C).

- 1 16. The program product of claim 15 wherein the signal bearing media comprises
2 recordable media.

- 1 17. The program product of claim 15 wherein the signal bearing media comprises
2 transmission media.

- 1 18. The program product of claim 15 wherein the performance data comprises data
2 collected by an operating system.

- 1 19. A program product comprising:
 - 2 (A) an operating system comprising:
 - 3 (A1) a performance data collection mechanism that collects performance
 - 4 data for a first computer system;
 - 5 (A2) a performance data transmission mechanism that, when enabled,
 - 6 transmits at least a portion of the performance data to a second computer system;
 - 7 (A3) a performance data access mechanism that allows access to the
 - 8 performance data only if the performance data transmission mechanism is
 - 9 enabled; and
 - 10 (B) computer-readable signal bearing media bearing the operating system.
- 1 20. The program product of claim 19 wherein the signal bearing media comprises
2 recordable media.
- 1 21. The program product of claim 19 wherein the signal bearing media comprises
2 transmission media.
- 1 22. The program product of claim 19 wherein the performance data comprises data
2 collected by an operating system.



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Law Firm: Martin & Associates, L.L.C.
Date Mailed: November 28, 2005

Title: **APPARATUS, METHOD, AND BUSINESS METHOD FOR
ENABLING CUSTOMER ACCESS TO COMPUTER
SYSTEM PERFORMANCE DATA IN EXCHANGE FOR
SHARING THE PERFORMANCE DATA**

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